

**PLANNING AND ZONING COMMISSION
STAFF REPORT**

June 18, 2009



Administrative Appeal AA 09-01: Leo Gonzalez, II

CASE DESCRIPTION: an appeal of the Site Development Review Committee's determination that final approval of a site plan for a proposed commercial development requires prior approval (by the City of Bryan) of a replat of two lots into one lot, in accordance with the requirements for such replats of the City of Bryan's Subdivision Ordinance

LOCATION: 2107 South College Avenue between Carson and Howard Streets

LEGAL DESCRIPTION: Lots 4 and 5 in Block B of Hillcrest Addition

EXISTING LAND USE: vacant office/warehouse building, concrete parking lot

EXISTING ZONING: South College Business District (SC-B)

APPLICANT(S): Leo Gonzalez, II

STAFF CONTACT: Kevin Russell, Director of Planning and Development Services

SUMMARY RECOMMENDATION: Staff recommends **upholding** the determination of the Site Development Review Committee that a formal replat is required to authorize commercial development and occupancy of this property.



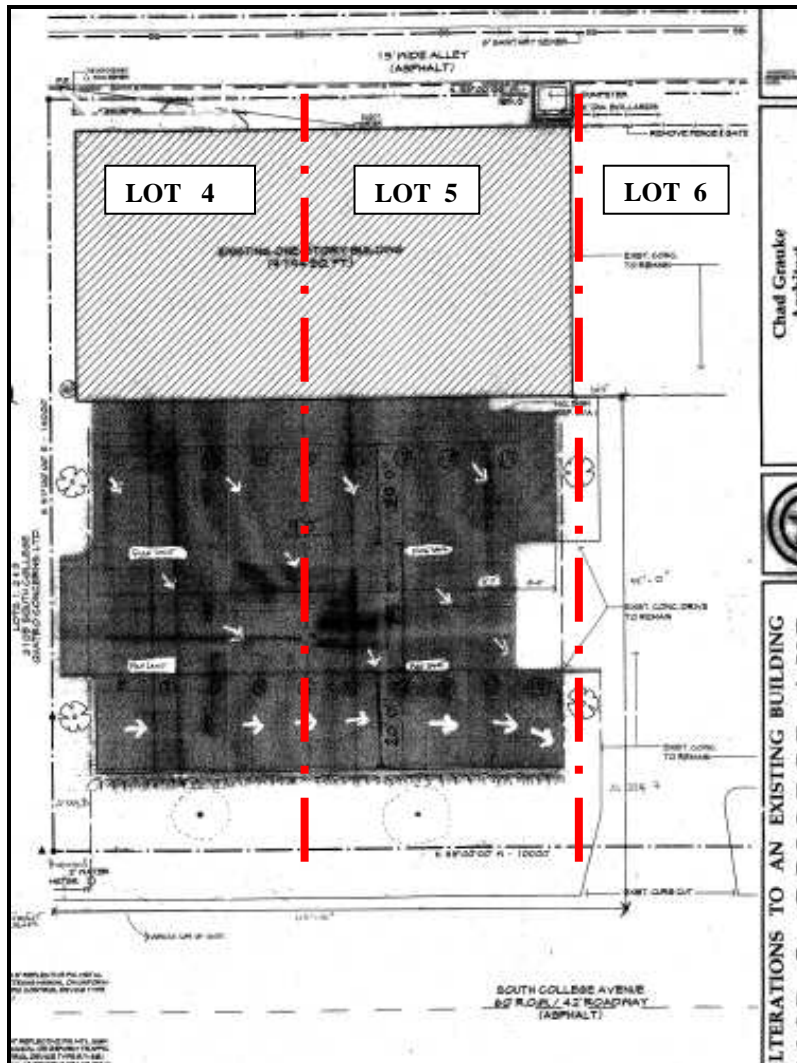
BACKGROUND:

The applicant, Mr. Leo Gonzalez, II owns four lots in the 2100 block of South College Avenue (Lots 4-7 in Block B of Cavitt's Hillcrest Addition) which are highlighted on the aerial photograph above. These four lots are occupied by two office/warehouse-type structures. One of these structures is situated parallel to South College Avenue on Lots 4 and 5; the other is situated

perpendicular to South College Avenue on Lot 7. Lot 6 serves as a common driveway access to both buildings and is mostly-improved with a driving surface for automobiles.

On February 22, 2008, the Site Development Review Committee conditionally approved Mr. Gonzalez's site plan application to develop a laundromat (self-service washateria) on these four lots (case no. SP07-33). With the conditional approval of that site plan, the applicant was authorized to build a concrete parking lot in front of the existing office/warehouse building on Lots 4 and 5, with the condition that a replat be submitted for approval before the building was to be occupied. Since then, a concrete parking lot was constructed, but no formal replat application was ever submitted to the city for approval.

Earlier this year, the city informed the applicant that the previously approved site plan authorizing development on this site (subject to the replat condition) had expired. The applicant submitted a new site plan application for a laundromat/self-service washateria at this location (case no. SP09-26) on April 22, 2009. However, this time, the application for site plan approval was made for only Lots 4 and 5, where the existing office/warehouse building and the new concrete parking area that had been built in the last 12 months are located. An excerpt from that site plan is shown below. The lot lines (red) are shown in approximate locations.



Following its review of his latest site plan application, the Site Development Review Committee (SDRC) reminded the applicant on April 28, 2009, that approval of this site plan requires prior approval of a replat by the City of Bryan, in accordance with the requirements for such replats, which are stipulated in the Subdivision Ordinance (Bryan Code of Ordinances Chapter 110). The SDRC bases its determination on the following sections of the Bryan Code of Ordinance (emphasis added):

Land and Site Development Ordinance Section 62-78: Site development review committee--Purpose.

The site development review committee shall be organized to generally ensure compliance by site owners *with all applicable codes*, regulations, laws, ordinances and plans and to coordinate examination of development proposals *to ensure that all city requirements, established by ordinance, resolution or policy, have been met without conflict*. The site development review committee shall have all the power and duties specifically provided for herein.

Subdivision Ordinance Section 110-2. Overview.

(a) A filed plat shall be required in accordance with the procedures outlined in this chapter in the following circumstances:

- (1) Subdivision of land into two or more parts.
- (2) *Changed configuration of existing filed plats.*
- (3) Division of land where there is not access to the tract.
- (4) Division of land where new public infrastructure is required.
- (5) Development of land where new public infrastructure is required.

(b) *If the development coordinator or his or her designee determines that a plat or replat is required, no building permit shall be issued by the city for any new or existing structure on property which does not comply with the standards contained or referred to herein.* No lot, parcel, or tract of land shall be offered for sale, contract for sale, or option be given until a final plat has been filed.

On June 5, 2009, Mr. Gonzalez appealed staff's determination that a replat is required in this particular circumstance. As reason for requesting the appeal, the application form states "replat not required per city code". In lieu of a formal replat, Mr. Gonzalez drafted a "restrictive covenant" which is intended to prohibit the sale of one of the lots without the other. The draft covenant is attached to the end of this staff report. According to an email from Mr. Gonzalez of May 26, 2009, "the covenant would run with the land and can only be terminated or amended by the owner of the land and someone from the Planning and Zoning Commission for the City of Bryan." Staff believes that such a covenant is insufficient to satisfy the ordinance requirement to submit a replat in this particular case and would merely circumvent the city code's requirements to save "time and expense of a replat."

The Planning and Zoning Commission is authorized to hear and decide appeals to any decision made by the SDRC. The Commission may do one of the following:

1. uphold the SDRC's determination that a replat is required in this particular case; or
2. overturn the SDRC's determination that a replat is required in this particular case.

ANALYSIS AND RECOMMENDATION:

In this particular case, staff determined that the existing and proposed development of this site had changed/changes the configuration of lots in Block B of the existing recorded subdivision plat of Cavitt's Hillcrest Addition (Brazos County Deed Records, Vol. 36, Pg. 3). Staff further determined that this circumstance requires submission and approval of a replat "to ensure that all city requirements, established by ordinance, resolution or policy, have been met without conflict" (Land and Site Development Ordinance Section 62-78). In circumstances such as these, where a commercial development crosses over a common lot line, staff routinely requests that a formal replat be submitted for the city's approval to match up the lot configuration with how a property was developed.

Staff believes that allowing a "restrictive covenant" in lieu of a formal replat would create a parallel system to the recognized system of replatting, but this new system is only available to those who are privileged with knowledge of this type of law. Since the published city ordinances discuss replats as the only option in situations like these, allowing another legal instrument to work in place of a formal replat would be creating an exclusive system for this one property owner. Staff maintains that formal replats are the only method recognized by the city code to combine multiple lots into one.

In this case, the existing office/warehouse building and new parking lot were built over a lot line (the one shared by Lots 4 and 5). Neither Lot 4 nor Lot 5 currently has driveway access onto South College Avenue.* While it appears that this is one consolidated development, the improvements (warehouse, parking lot and driveway) are technically still situated on separate lots, i.e., separate building sites. These lots can legally be sold or otherwise conveyed. This can potentially create problems, for example, for the enforcement of building codes (fire separation; location of utility connections), access management standards (two additional driveways onto South College Avenue, a minor arterial street), minimum off-street parking standards, building setback standards and other development requirements.

The City of Bryan is sensitive to redevelopment and infill developments, especially in older parts of Bryan where lots are often too small to accommodate modern commercial development. In this particular case, lots, blocks and streets in Cavitt's Hillcrest Addition were created 100 years ago. These 7,000 square foot lots, 50-foot wide and 140-foot deep that are now zoned for (or proposed for development with) commercial establishments pose challenges to the application of adopted development standards. Replatting, i.e., the consolidation of these lots and thereby creating more usable building sites for modern commercial development is necessary to prevent substandard commercial development along one of Bryan's major thoroughfares.

Based on all these considerations, staff recommends **upholding** the determination of the Site Development Review Committee that a formal replat is required to authorize commercial development and occupancy of this property.

* Since access to the building and parking lot on Lots 4 and 5 is proposed to be taken from adjacent Lot 6, the Site Development Review Committee has asked for the submission of a perpetual joint access easement instrument for an at least 25-foot wide private driveway access across Lot 6 in favor of Lots 4 and 5. No such instrument has been submitted to date.

RESTRICTIVE COVENANT

This Restrictive Covenant regarding development of the property located at 2107 South College Avenue, Bryan, Brazos County, Texas (the "Restrictive Covenant"), is executed this 25th of May, 2009, by Leopoldo Gonzalez, II, ("Declarant") and is as follows:

RECITALS

A. Owner is the owner of land, more particularly described as LOTS FOUR (4) AND FIVE (5), BLOCK "B", CAVITT'S HILLCREST ADDITION, CITY OF BRYAN, ACCORDING TO PLAT THEREOF RECORDED IN VOLUME 36, PAGE 3 OF THE DEED RECORDS OF BRAZOS COUNTY, TEXAS, herein referenced as the "Property".

B. Definitions:

Owner. The term "Owner" means, individually, and collectively, Owner and all future owners of the fee interest or any portion of the Property (whether such fee interest is obtained through a purchase from Owner or through a purchase at a foreclosure sale or trustee's sale or through a deed in lieu of foreclosure) and their successors and assigns.

C. Owner has agreed to impose upon the Property these covenants and conditions for the benefit of the Property in accordance with the terms hereof.

NOW, THEREFORE, it is hereby declared that the Property be subject to the following covenants, conditions and restrictions which shall run with the Property and shall be binding upon all parties having right, title, or interest in or to such portion of the Property or any part, their heirs, successors, and assigns and shall inure to the benefit of each Owner. Each contract, deed or conveyance of any kind conveying all or a portion of such Property shall conclusively be held to have been executed, delivered, and accepted subject to the following covenants, conditions and restrictions, regardless of whether or not the same are set out in full or by reference in said contract, deed or conveyance.

SPECIFIC AGREEMENTS AND RESTRICTIONS:

1. Recitals Incorporated. The above Recitals and all terms defined therein are incorporated into this Restrictive Covenant for all purposes.
2. That the Property being LOTS FOUR (4) AND FIVE (5), BLOCK "B", CAVITT'S HILLCREST ADDITION, CITY OF BRYAN, ACCORDING TO PLAT THEREOF RECORDED IN VOLUME 36, PAGE 3 OF THE DEED RECORDS OF BRAZOS COUNTY, TEXAS, shall only be sold as one property. Lot Four (4) may not be sold individually and without Lot Five (5). Lot Five (5) may not be sold individually and without Lot Four (4). Property consisting of Lots Four

(4) and Five (5) must be sold as a single unit and shall not be subdivided into separate lots.

3. Breach Shall Not Permit Termination. Notwithstanding anything to the contrary contained herein, no breach of this Restrictive Covenant shall entitle the Owner to cancel, rescind or otherwise terminate this Restrictive Covenant, but such limitations shall not affect in any manner any other rights or remedies which the Owner may have hereunder by reason of any breach of this Restrictive Covenant.

4. Conveyance. This Restrictive Covenant does not convey interest in real property to the public or any governmental body.

5. General Provisions.

A. Inurement. This Restrictive Covenant and the restrictions created hereby shall inure to the benefit of and be binding upon the Owner, and its successors and assigns. If the Owner conveys all or any portion of the Property, the Owner shall thereupon be released and discharged from any and all further obligations, if any, under this Restrictive Covenant that it had in connection with the property conveyed by it from and after the date of recording of such conveyance, but no such sale shall release the Owner from any liabilities, if any, actual or contingent, existing as of the time of such conveyance.

B. Duration. Unless terminated in accordance with Paragraph 5(J) below, this Declaration shall remain in effect in perpetuity.

C. Severability. The provisions of this Restrictive Covenant shall be deemed independent and severable, and the invalidity or partial invalidity of any provision or portion hereof shall not affect the validity or enforceability of any other provision.

D. Entire Agreement. This Restrictive Covenant and the exhibits attached hereto contain all the representations and the entire agreement between the parties to this Restrictive Covenant with respect to the subject matter hereof. Any prior correspondence, memoranda or agreements are superseded in total by this Restrictive Covenant and the exhibit attached hereto. The provisions of this Restrictive Covenant shall be construed as a whole according to their common meaning and not strictly for or against any Owner.

E. Captions. The captions preceding the text of each section and subsection hereof are included only for convenience of reference and shall be disregarded in the construction and interpretation of this Restrictive Covenant.

F. Governing Law; Place of Performance. This Restrictive Covenant and all rights and obligations created hereby shall be governed by the laws of the State of Texas. This Restrictive Covenant is performable only in the county in Texas where the Property is located.

G. Notices. Any Notice to the Owner or the City shall be in writing and given by delivering the same to such party in person, by expedited, private carrier services (such as Federal Express) or by sending the same by registered or certified mail, return receipt requested, with postage prepaid to the intended recipient's last known mailing address. All notices under this Restrictive Covenant shall be deemed given, received, made or communicated on the date personal delivery is effected or, if mailed, on the delivery date or attempted delivery date shown on the return receipt.

H. Negation of Partnership. None of the terms or provisions of this Restrictive Covenant shall be deemed to create a partnership between or among the Owner, any Developer, or the City of Bryan in their respective businesses or otherwise; nor shall it cause them to be considered joint ventures or members of any joint enterprise.

I. Enforcement. If any person, persons, corporation, or entity of any other character shall violate or attempt to violate this Restrictive Covenant, it shall be lawful for the City of Bryan, its successors and assigns, to prosecute proceedings at law, or in equity, against said person, or entity violating or attempting to violate such covenant and to prevent said person or entity from violating or attempting to violate such covenant. The failure at any time to enforce this Restrictive Covenant by the City of Bryan, its successors and assigns, whether any violations hereof are known or not, shall not constitute a waiver or estoppel of the right to do so.

J. Modification and Amendment. This Restrictive Covenant may only be modified, amended or terminated upon the filing of such modification, amendment or termination in the Official Records of Brazos County, Texas, executed, acknowledged and approved by (a) a member of the City of Bryan Planning and Zoning Commission; and (b) the Owner of the Property at the time of the modification, amendment, or termination.

Executed to be effective this ____ day of _____, 2009.

OWNER: LEOPOLDO GONZALEZ, II

By: _____,
Leopoldo Gonzalez, II

STATE OF TEXAS §
COUNTY OF BRAZOS §

Before me _____, Notary Public, on this day personally appeared _____, _____ of _____, a Texas Limited Partnership on behalf of _____, known to me personally to be the person whose name is subscribed to the foregoing instrument and he acknowledged that he executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office on _____, 2009.

Notary Public, State of Texas

ACCEPTED: CITY OF BRYAN

By: _____

Name: _____

Title: _____

APPROVED AS TO FORM:

By: _____